

Timmerman



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Trading Atlanta Ltd.

File: B-239056

Date: August 1, 1990

Stanley Joffe, for the protester.
Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.
Barbara Timmerman, Esq., Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Although the protester argues that an evaluation differential under the Buy American Act should not have been applied to its low-priced offer for South African chamois, the protest is denied since the Trade Agreements Act of 1979 (TAA) properly applied to the procurement in lieu of the Buy American Act and the TAA bars the agency from accepting South African products; therefore, the protester was not prejudiced by the award to a higher priced domestic competitor.

DECISION

Trading Atlanta Ltd. protests the award of a contract to Surak Leather Company under request for proposals (RFP) No. DLA100-90-R-0007, issued by the Defense Logistics Agency (DLA) for 5,000 packages of assorted chamois leather sheepskins. Trading Atlanta contends that its low-priced offer for foreign chamois should not have been subject to an evaluation differential under the Buy American Act, 41 U.S.C. §§ 10a et seq. (1988), since chamois allegedly is not available domestically in sufficient quantities.

We deny the protest.

The RFP was issued on an unrestricted basis on November 22, 1989, and closed on December 28. Offers were received from Trading Atlanta and Surak (a small business concern). When best and final offers (BAFO) were requested on February 26, 1990, the RFP was amended to include clauses implementing the Buy American Act, which as implemented, generally

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provides an evaluation preference for domestic items in government procurements. In its BAFO, the protester offered South African chamois at a total price of \$230,400, while Surak offered domestic chamois at a total price of \$234,500.

The principal Buy American Act clause incorporated into the RFP appears at Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7001. In pertinent part, the clause requires the addition of a 12 percent evaluation differential to offers of foreign products in competition with offers of domestic products from small businesses. DFARS § 252.225-7001(d)(iii); Federal Acquisition Regulation (FAR) § 25.105. However, the clause also provides that an evaluation differential need not be applied to offers of products, regardless of their source, if the agency determines that the components of those products are not reasonably available domestically in sufficient quantities. See DFARS § 252.225-7001(a)(iv); FAR §§ 25.102(a)(4), 25.108. Since DLA determined that chamois was reasonably available domestically, it applied the differential to the protester's bid with the result that Surak was evaluated as the low offeror. After award was made to Surak, Trading Atlanta filed this protest, principally alleging that the agency erred in finding that chamois was reasonably available domestically.

For the following reasons, we find that DLA should not have used the Buy American Act clauses in this procurement but that Trading Atlanta was not prejudiced as a result of this error.

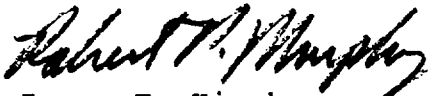
The Trade Agreements Act of 1979 (TAA), 19 U.S.C. §§ 2501 et seq., as implemented by FAR subpart 25.4, provides that when the value of certain government procurements exceed a dollar threshold established by the United States Trade Representative, the provisions of the TAA apply to the procurement and the provisions of the earlier-enacted Buy American Act are waived. See 19 U.S.C. § 2511(a); FAR § 25.402(a)(1); Becton Dickinson AcuteCare, B-238942, July 20, 1990, 90-2 CPD ¶ _____. The TAA dollar threshold that was in effect through December 31, 1989, was \$156,000. 55 Fed. Reg. 185 (1990). Since the value of the procurement in issue was far in excess of that amount, by law the Buy American Act was waived and DLA's use of its implementing clauses was not authorized.

However, the TAA also bars government agencies from accepting offers of products which are not from countries that are "designated" by the President of the United States

for participation under the TAA. See 19 U.S.C. § 2512(a); FAR § 25.402(c); Becton Dickinson AcuteCare, B-238942, supra. South Africa, the primary source of the protester's chamois, is not a "designated country" for purposes of the TAA. See FAR § 25.401. Since DLA was barred by the applicable statute from accepting the protester's offer of products from a non-designated country, Trading Atlanta was not prejudiced as a result of the award to Surak even though the award was based on the application of an inapplicable statute.

Trading Atlanta also contends that the agency should have required Surak to provide certifications from all of its sources stating that the chamois leather to be supplied would be 100 percent domestic. The agency points out that Surak certified in its BAFO that it would furnish a domestic product. The record shows that Surak also wrote "[a]ll raw material is of U.S. origin. All tanning will be by us in the U.S.A." on the certificate and, in its BAFO, reiterated that statement. Although an agency should not automatically rely on an offeror's certification of domestic origin where there is reason to question whether domestic material will be furnished, there simply is no evidence here that suggests that Surak will supply other than domestic chamois. See Autospin, Inc., B-233778, Feb. 23, 1989, 89-1 CPD ¶ 197. We consequently see no reason for the agency to require Surak to furnish additional documentation concerning its sources. To the extent that the protester contends that Surak will not deliver a domestic product, the acceptance of Surak's offer legally obligates the firm to supply domestic chamois. Whether the awardee does, in fact, comply with that obligation is a matter of contract administration which we do not consider under our bid protest function. Baldt, Inc., B-235102, May 11, 1989, 89-1 CPD ¶ 445.

The protest is denied.



for James F. Hinchman
General Counsel